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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE and COE PRESS, INC.,

Petitioners,

—v.—

JANE DOE,

Respondent.

PETITIONERS' REPLY BRIEF

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This brief is respectfully submitted in reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari. Although Respondent's brief presents little relevant law, the facts as presented by Respondent are so seriously misstated[1] as to distort the entire nature and present posture of the case. Throughout Respondent's statement of the case, there are numerous erroneous assertions of fact, which are not supported by record references of any sort.

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[1] Respondent takes up most of page 4 of its brief with a quotation from the book which it attempts to portray as typical of the "information confided." The extent of this gross deception is clear when the quotation is placed in the context of the book's 1008 pages (and 1716 footnotes), which make it apparent that it is in fact a scientific case history of the treatment of schizophrenia.

1. The central and critical misstatement[2] is the assertion, at pages 4-5 of Respondent's brief, that "Although the Patient, her husband and their child are given fictitious names in the book, the circumstances of their lives are so unusual that the Patient and her family are identifiable."[3]

If the Respondent cannot be identified by readers of the book, her entire case falls, as she simply is not hurt in any way by a book which reveals that some anonymous person told her psychotherapist of the experiences related in the book. On this crucial issue, only one court has made a clear finding, and that finding was directly contrary to Respondent's assertions, the *nisi prius* court having held it most unlikely that the Respondent could be identified by readers of the book (5a). Even if this factual issue had not been resolved in any way, much less where it has been resolved against the Respondent. the central issue presented by this petition is whether federal constitutional law

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[2] Numerous other serious distortions appear. Among these are the assertion (p. 5) that "Both [parties] agree that the psychiatrist requested, and the Patient refused, to give written consent," to publication. Petitioners deny that this is so. Petitioners also do not agree with Respondent's characterization of the correspondence between Dr. Doe and the Respondent's prior attorney (pp. 5-6). Dr. Doe was not attempting "to discourage further investigation," nor attempting to suggest that the book was not about the Respondent. Indeed, the letter in question, which was in *response* to the attorney's letter, stated that the complete manuscript was in Respondent's possession for more than 10 years, a fact which the brief in opposition does not reveal. Dr. Doe, in fact, invited further communication, and when none was forthcoming, assumed that the earlier consent to publication remained valid.

[3] In addition to the change of names, numerous other steps were taken to disguise the Patient's identity; the book describes the patient as the mother of an only child, while, as even Respondent's brief notes (p. 6), the Patient has two children. The locale of the events in the patient's life is not identified. Most significantly, the therapy which is the subject of the book began *more than 17 years ago*, in 1956, and terminated more than 10 years ago, in 1963.

permits the issuance of a preliminary injunction, where issues of fact and of state law concerning the substance of the case are almost totally unresolved. The courts below have reached a final and clearly erroneous decision on this major constitutional issue, and that error may only be resolved if this Court grants certiorari.

2. The error committed by the courts below flows from a total misperception of the presumption in favor of freedom of the press which is guaranteed by the First Amendment. In essence, the lower courts have held that because there is a *possibility* that further publication of the book will invade the Respondent's privacy, and there is a *possibility* that New York law will finally be found to give a cause of action for such invasion, there must issue an injunction which immediately and unavoidably abridges the constitutional liberties of the Petitioners and of countless members of the reading public, lay and professional alike.[4]

For similar reasons, none of the arguments presented in Point I of Respondent's brief are of any particular relevance. The provisions of New York statute and regulations —which allow professional discipline as the sole remedy— concerning the disclosure by doctors of communications from their patients plainly contemplate situations in which the patient's identity is revealed, as do such cases as *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y. Supp. 481 (Sup. Ct. 1st Dept. 1920) (patient's photograph revealed in motion picture, without written consent, in violation of Sections 50 and 51 of New York Civil Rights Law).

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[4] Respondent's brief is totally silent on the chilling effect on medical case history publication of a doctrine which requires written consent regardless of the effectiveness of the disguise. Rather than face this question, Respondent quotes a "salacious" passage and inaccurately implies that it is typical. See n. 1, *supra*.

3. Respondent's assertions that this Court is without jurisdiction, because the decision below is not sufficiently final, are plainly without merit. The courts below have reached a final decision, otherwise unreviewable by this Court, on an important issue of federal constitutional law: whether the First Amendment permits the granting of a preliminary injunction against publication of a book upon a factual and legal showing as flimsy as that presented by Respondent here. Indeed, the very case cited by Respondent, *Cobbledick* v. *United States,* 309 U.S. 323 (1940), makes plain that the application of the finality doctrine is a matter of policy, to further the orderly administration of justice and to avoid interrupting a case to "consider incidentally a question which has happened to cross the path of such litigation. . . ." 309 U.S. at 326, quoting *Segurola* v. *United States,* 275 U.S. 106, at 112 (1927) (per Mr. Chief Justice Taft).

So far from being an incidental question which has happened to cross the path of this case, the issue presented by this petition is one which is central and critical to the entire case, and which has arisen because of the Respondent's own actions in seeking a preliminary injunction. As *Cobbledick* makes clear, review will not be denied where to do so would render the Petitioner "powerless to avert the mischief of the order" which is sought to be reviewed, and where such denial would make the finality doctrine "a means of denying [Petitioner] any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." 309 U.S. at 328-329.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
May 9, 1974.

Respectfully submitted,

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